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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GREGORY ALAN SMITH,

Petitioner,

—v.—

METRO-NORTH COMMUTER RAILROAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court below, in disregard of Baker v. Texas and Pacific Railway Co., 359 U.S. 227 (1959), and other decisions of this Court, and in violation of the Federal Employer's Liability Act, deprived petitioner of a jury trial by granting summary judgment to respondent Metro-North Commuter Railroad on the disputed issue of whether petitioner, an employee of an independent contractor, was, at the time of the accident, also "employed by" respondent Metro-North within the meaning of the Act since, at the time of the accident, petitioner was performing railroad work on Metro-North's electrified railroad tracks under the direct, active, on-site supervision and control of Metro-North's track foreman and tower operator.

TABLE OF CONTENTS

	Page
Opinions Below.....	1
Jurisdiction.....	2
Statute Involved.....	2
Statement of the Case.....	4
Reasons for Granting the Writ....	9
Conclusion.....	20

TABLE OF AUTHORITIES

Pages

Cases:

Ancelet v. Nat'l Railroad Passenger Corp., 913 F.Supp. 968 (E.D.La. 1995).... 15

Atchison, Topeka & Santa Fe Co. v. Buell, 480 U.S. 557 (1987)..... 14

Baker v. Texas and Pacific Railway Co., 359 U.S. 227 (1959).....7,.10, 11, 13, 15, 17, 18

Brasswell v. New York, Chicago and St. Louis R. Co., 377 U.S. 405 (1964)..... 10

Conrail v. Gottshall, 512 U.S. 532 (1994)..... 13

Davis v. Baltimore and Ohio R.R. Co., 379 U.S. 671 (1965)..... 11

Gibson v. Thompson, 355 U.S. 118 (1957)..... 10

Harris v. Pennsylvania R. Co., 361 U.S. 15 (1959).....10, 11

Honeycutt v. Wabash Ry. Co., 355 U.S. 424 (1958)..... 10

Johannessen v. Gulf Trading & Transp. Co., 633 F.2d 653 (2d Cir. 1980)..... 14

Kelley v. Southern Pacific Co., 419 U.S. 318 (197412,.13,.15,.16,.17, 18

Lindsey v. Louisville and Nashville Co., 775 F.2d 1323 (1985)..... 15

Marchica v. Long Island R.R., 31 F.3d 1197 (2d Cir. 1994)..... 14

Masiello v. Metro-North Commuter RR, 748 F.Supp. 199 (S.D.N.Y. 1990)... 13

Meeks v. Georgia S. & F. Ry. Co., 377 U.S. 405 (1964)..... 10

Melancon v. Amoco Production, 834 F.2d 1238 (5th Cir. 1988)..... 15

Moore v. Terminal R.R. Assoc., 358 U.S. 31 (1958)..... 10

Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1 (1963)..... 15

Smoot v. New York Susquehanna and Western RR Corp., 707 F.Supp. 629 (N.D.N.Y. 1989)... 13

Stiltner v. Norfolk & Western Railway Co., 1994 WL 901187, *2 (W.D.Va. 1994).. 15

Tennant v. Peoria and Pekin Union R. Co., 321 U.S. 229 (1944)..... 12

Ulfik v. Metro-North Commuter R.R.,
77 F.3d 54 (2d Cir. 1996)..... 14

Wamsley v. Champlin Refining and
Chemicals, Inc.,
11 F.3d 534 (5th Cir. 1993)..... 13

Ward v. Atlantic Coast Line R. Co.,
362 U.S. 396 (1960).....13, 15

Statutes:

49 CFR (Subpart b), § 213.37..... 4

28 U.S.C. § 1257..... 2

45 U.S.C. § 51..... 2, 7

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

GREGORY ALAN SMITH,

Petitioner,

-against-

METRO-NORTH COMMUTER RAILROAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

OPINIONS BELOW

The Order of the New York State Court of Appeals denying petitioner's Motion For Leave To Appeal entered November 21, 1996 (App., infra, p. 1a-2a), is unreported. The Order of the New York State Supreme Court, Appellate Division, First Department, denying petitioner's Motion For Leave To Appeal To The New York State Court of Appeals entered August 1, 1996 (App., infra, p. 3a-4a), is unreported. The Decision and Order of the Supreme

Court of the State of New York, Appellate Division, First Department, granting summary judgment to defendant-respondent Metro-North Commuter Railroad entered on April 9, 1996 (App., infra, pp. 5a-10a), is reported at ___ A.D.2d ___, 641 N.Y.S.2d 8, ___ N.E.2d ___. The Decision and Order of the Supreme Court, New York County, entered October 19, 1995, denying Respondent Metro-North Commuter Railroad's second motion for summary judgment (App., infra, pp. 11a-18a), is unreported. The Decision and Order of the Supreme Court, New York County, entered March 12, 1991, denying Respondent Metro-North Commuter Railroad's first motion for summary judgment (App., infra, pp. 19a-26a), is unreported.

JURISDICTION

The Order of the New York State Court of Appeals was entered on November 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTE INVOLVED

The Federal Employers Liability Act, 45 U.S.C. § 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia

or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

On August 7, 1988, while spraying vegetation and brush on Respondent Metro-North's railroad tracks as part of the railroad's track maintenance program, Petitioner Gregory Smith, then a 29-year-old father of three, came into contact with high-voltage overhead wires, resulting in amputation of both legs below the knee (A. 21-24, 149-150).[1]

Mr. Smith was employed by Asplundh Tree Expert Company ("Asplundh"). Asplundh was under contract with Metro North to perform federally mandated track maintenance services (A. 41) under regulations issued by the Federal Railway Administration, 49 CFR (Subpart b), § 213.37, to keep tracks free of brush and weeds. The spraying was conducted from a self-powered high rail spraying vehicle, which could operate on both roadways and railroad tracks. The vehicle itself had been approved for use on its tracks by Respondent railroad (A. 42). The tracks on which the vehicle was operating were energized by high-voltage overhead wires (A. 42-46, 147-150). The work was carried out under specific rules issued by Metro-North (A. 169-174).

On the day of the accident, Mr. Smith was one of a three-man crew on the vehicle. He did the actual spraying. The

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[1] "A. ___" refers to the Appendix filed in the Appellate Division, First Department.

other crew members were William Simmonds, also an Asplundh employee, who was driver of the vehicle, and Cornelius Vines, a Metro-North track foreman (A. 148).

Mr. Vines was in complete control of the spraying operation. He sat in the cab's passenger seat next to Mr. Simmonds and he instructed Mr. Simmonds where and when to enter upon the railroad tracks. Vines instructed Mr. Smith where and when to spray. Vines was in communication with Metro-North tower operators, who instructed him when to move the vehicle onto the through tracks, and when to move onto a siding to allow through trains to pass (A. 148).

As Mr. Smith swore in his affidavit without contradiction, Mr. Vines exercised "complete control over our spraying operations and therefore we followed his instructions carefully" (Ibid). Smith further swore that:

> "Connie Vines directly supervised both me and Bill Simmonds that day in virtually every aspect of our spraying. Connie Vines instructed us precisely when and where to drive the truck and when and where to spray at all times that day prior to and at the time of the accident. At every point that we were to commence our spraying operations the Metro-North operator gave Connie Vines written approval for our entry onto the tracks by getting an 'M-Form'

> signed.... [W]e could not do any work at all until a Metro-North operator cleared us to enter the track and Connie Vines told us what to do" (A. 150).

The testimony of two Metro-North engineers reinforced Mr. Smith's testimony as to Mr. Vine's control of the operation (A. 161, 162, 166-168). No Asplundh supervisor was present or had any role in the spraying activities on the day of the accident.

Metro-North did not dispute the facts recited above. However, it submitted proof that Mr. Smith had a traditional employment relationship with Asplundh including training, payment of wages, work assignments, maintenance of daily logs, and discipline (A. 58-59, 74-75, 82, 119-120, 128-129, 190).

In the mid-afternoon of the day of the accident, Metro-North determined that the spraying operations would have to be halted temporarily to allow a through train to pass. Just before the accident, the Metro-North tower operator at Devon Tower received instructions from the Metro-North trainmaster that the track should be cleared for the passing train. The Metro-North tower officer passed these orders to Mr. Vines, the Metro-North track foreman, who instructed petitioner Smith and driver Simmonds that the vehicle had to be moved from the through track to a siding (A. 148-149). Smith was on the top of the high-rail spray vehicle. In alighting from the vehicle, he came in contact with an overhead high-voltage

energized catenary wire that Metro-North had failed to de-energize, resulting in his injuries (A. 149). The failure to de-energize the wires while Smith was working under and within ten feet of them violated Metro-North's work rules (A. 174).

This action was commenced in New York State Supreme Court, New York County, in January, 1990 under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq. In December, 1990, respondent Metro-North filed a Motion for Summary Judgment arguing "... that Metro-North exercised no control over the activities of Asplundh or its employees and, therefore, plaintiff has no cause of action against Defendants under the FELA" (A. 156). The Supreme Court denied the motion, ruling that "the proper inquiry is whether defendants exercised sufficient control over plaintiff's activities within the ambit of FELA" (A. 157; App., infra, p. 23a-24a). Citing Baker v. Texas and Pacific Ry. Co., 359 U.S. 227 (1959), the Court held that the issue was for the jury. The Court further ruled that "The opposing Affidavits submitted to this Court clearly indicate a question of fact which will necessitate a trial" (A. 157-158; App., infra, p. 24a). Metro-North did not appeal the decision.

Subsequent to denial of the motion for summary judgment, discovery proceeded. Upon completion of discovery and while the case was on the trial calendar, Metro-North renewed its motion for summary judgment "on the ground that plaintiff was not an 'employee' of the railroad ..." (A. 6;

App., infra, p. 12a), the same ground presented in the previous motion.

The Court denied Metro-North's second motion for summary judgment on two grounds: first, the Court ruled that to the extent that Metro-North's second motion for summary judgment "... seeks a determination that as a matter of law plaintiff was not an 'employee' of MTA [Metro-North] as that term is used in FELA, [it] must be denied on 'law of the case' grounds alone" (A. 7; App., infra, p. 14a).

More significantly, the Court also considered the parties' factual submissions de novo and ruled that "this Court concludes that an issue of fact has been raised as to whether plaintiff could be considered an 'employee' of Metro-North pursuant to FELA" (A. 8; App., infra, p. 15a). The Court reached that conclusion after review of the facts submitted by petitioner in opposition to the motion: Mr. Vines was generally in the passenger seat receiving instructions from Metro-North tower operators, he decided where and when the vehicle entered the tracks, where and when the crew sprayed, where and when it moved on to the through tracks or was sent to a siding, that plaintiff came in contact with the wires when trying to get off the spray truck just after it was stopped upon orders of Metro-North, that energized overhead wires are a "not atypical hazard of railroads," and that "herbicide spraying is necessary to keep the tracks clear" (A. 8; App., infra, p. 16a). Based on that evidence, the court con-

cluded that "... plaintiff would appear naturally to fit within the Congressional intendment in passing the FELA," and added that "Other evidence submitted by the parties; federal railway regulations; and the contract at issue either support plaintiff's position, or do not seriously undermine it" (Ibid).

Metro-North appealed to the Appellate Division, First Department. The First Department overturned the two lower court decisions and granted Metro-North's motion for summary judgment, dismissing Smith's action in its entirety. The Court held that "A review of the factors to be considered in making this determination [that at the time of the accident petitioner was a railroad employee within the meaning of the Federal Employer's Liability Act] ... clearly indicates that plaintiff was not an employee of defendant Metro-North at the time of the accident ..." (App., infra, p. 7a). Its opinion, which is cursory at best, completely ignores the relevant factual law and totally fails to consider or analyze the uncontradicted evidence of direct, active supervision and control by Metro-North of the spraying operation that was submitted by petitioner, and also completely ignores the findings of the two trial court Justices below.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Appellate Division, First Department, has decided an important federal question

in a way that conflicts with relevant decisions of this Court.

The principle is established under decisions of this Court that a worker, although employed by an independent contractor, can be found at the same time, under certain factual conditions, to be also "employed by" a railroad employer within the meaning of the Federal Employer's Liability Act. It is equally established under decisions of this Court that the question whether or not an employee of an independent contractor is also employed by the railroad at the time of the accident is a question for the jury. Baker v. Texas & Pacific R. Co., 359 U.S. 227 (1959). Certiorari should be granted because the grant of summary judgment to Metro-North by the Appellate Division, in the face of a glaring factual issue as to whether Mr. Smith also was "employed by" Metro-North at the time of the accident within the meaning of FELA, ignored a consistent line of cases decided by this Court. Indeed, the decision below is so deviant, the Court should grant certiorari, summarily reverse, and remand the case for trial. The Court has frequently done just that in FELA cases. See, Gibson v.Thompson, 355 U.S. 18 (1957); Honeycutt v. Wabash Ry. Co., 355 U.S. 424 (1958); Moore v. Terminal R.R. Assoc., 358 U.S. 31 (1958); Harris v. Pennsylvania R. Co., 361 U.S. 15 (1959); Meeks v. Georgia S. & F. Ry. Co., 377 U.S. 405 (1964); Brasswell v. New York, Chicago and St. Louis R. Co., 377 U.S. 405 (1964);

Davis v. Baltimore and Ohio R.R. Co., 379 U.S. 671 (1965).[2]

This Court first held in Baker v. Texas & Pacific R. Co., supra, that the question as to whether a worker who is hired by an independent contractor is also "employed by" the railroad at the time of the accident within the meaning of FELA, is a question for the jury. The facts and legal issues in Baker were essentially the same as in Mr. Smith's case. Baker was employed by an independent contractor which was under contract with respondent railroad to perform certain track maintenance activities. The work consisted of pumping sand and cement into the roadbed to strengthen or stabilize it. Baker was struck and killed by a train while engaged in that job. Evidence on the question whether decedent was "employed by" respondent railroad at the time of his death within the meaning of FELA was introduced at the state court trial. A special issue for the jury's determination was framed, but the judge declined to submit it to the jury, "holding as a matter of law that Baker was not in such a relationship to the railroad at the time of his death as to entitle him to the protection of the Act." The intermediate appellate court affirmed, and the Texas Supreme Court denied an application for a writ of error.

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[2] In Harris v. Pennsylvania R. Co., supra at 16-17, Justice Douglas stated that of 32 employee petitions in FELA cases granted over a period of more than 10 years, 15 were reversed without oral argument.

359 U.S. at 227-28. This Court reversed Per Curiam. Stating that the question "as to whose 'employee' or 'servant' a worker is at a given time [under FELA] present themselves as matters of federal law under the Act," the Court held that "the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions.... Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury." Id. at 228. The Court focused on the fact that petitioner Baker had introduced evidence to support a finding of FELA employment including evidence that the work being performed was part of the maintenance task of the railroad (as in the instant case) and that "... a supervisor admittedly in the employ of the railroad, in the daily course of the work exercised direct control over the details of the job performed..." (as in the instant case). Id. at 228; see also, Kelly v. Southern Pacific Co., supra, 419 U.S. at 331. The Court stated that since the railroad had introduced evidence tending to show that an employment relationship did not exist between it and Baker at the time of the accident, "[a]n issue for determination by the jury was presented..." and that "[t]he very essence of ... [the jury's] function is to select among conflicting inferences and conclusions that which it considered most reasonable.'" Id. at 229, quoting Tennant v. Peoria and Pekin Union R.Co., 321 U.S. 229, 335 (1944).

The Court has never departed from the principle that the jury is to determine whether or not an injured worker is "employed by" the railroad at the time of the accident. It was reconfirmed in Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, 400 (1960), which held that "the issue is one for determination by the jury on the basis of all the relevant factors," and in Kelley v. Southern Pacific Co., 419 U.S. 318, 322 (1974), where the Court remanded "to require the trier of fact to re-examine the record in light of the proper legal standard [announced in Baker v. Texas & Pacific R. Co.]." The principle is, of course, acknowledged and applied by the lower courts. See, e.g., Smoot v. New York Susquehanna and Western RR Corp., 707 F.Supp. 629 (N.D.N.Y. 1989), and Masiello v. Metro-North Commuter RR, 748 F.Supp. 199, 207 (S.D.N.Y. 1990).

The principle of reserving "employment" issues for the jury is an integral part of FELA's purpose of extending "liberal relief to railroad workers injured through the negligence of their employers." Conrail v. Gottshall, 512 U.S. 532, ___, 114 S.Ct. 2396, 2401, 129 L.Ed.2d 427, 436 (1994) (Thomas, J.). As Justice Thomas said, finding that a claim of negligent infliction of emotional distress is cognizable under FELA, "We have liberally construed FELA to further Congress' remedial goal." 129 L.Ed. 2d at 440.

As noted in Wamsley v. Champlin Refining and Chemicals, Inc., 11 F.3d 534, 541 (5th Cir. 1993), FELA was designed "to provide liberal recovery for injured work-

ers ... and 'to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations.'" FELA's legislative history "testifies ... that it was the intention of Congress in the enactment of [FELA] ... to shift the burden of the loss resulting from these casualties from 'those least able to bear it' and place it upon those who can, as the Supreme Court said in the Taylor case (210 U.S. 281), 'measurably control their causes.'" Id. at 541, n. 12. See, also, Atchison, Topeka & Santa Fe Co. v. Buell, 480 U.S. 557, 561-62 (1987); Ulfik v. Metro-North Commuter R.R., 77 F.3d 54, 58 (2d Cir. 1996); Marchica v. Long Island R.R., 31 F.3d 1197, 1202 (2d Cir. 1994), cert. denied, 115 S.Ct. 727 (1995); Johannessen v. Gulf Trading & Transp. Co., 633 F.2d 653, 656 (2d Cir. 1980).

In light of the virtually immutable principles set out above, the Appellate Division's decision in this case is insupportable.

Mr. Smith contended that, at the time of the accident, because of the significant control exercised over him by Metro-North employees, he was then a dual servant and that FELA required that the disputed employment issue be resolved by a jury (A. 157).

As shown above (supra, pp. 4-9), the record contains more than enough proof by petitioner on the question whether he was "employed by" Metro-North at the time of the accident, to require its submission to

the jury. Petitioner's uncontested evidence strongly supports the conclusion that, at the time of the accident, Mr. Smith was under the direct, active supervision and control of Mr. Vines, a Metro-North track foreman, who was present and, together with Metro-North's tower operator, actively supervised petitioner at the time of the accident. Whether Mr. Smith was subject to supervision and control by Metro-North at the time of the accident is the critical factor in determining whether he was also "employed by" Metro-North at the time he was injured. Kelly v. Southern Pacific, supra at 327. As the Fifth Circuit held in Lindsey v. Louisville and Nashville . Co., 775 F.2d 1323, 1324 (1985), the test of employment under FELA "is whether the railroad has control of the employee or the right to control the employee," and "plays 'a significant supervisory role' as to the work of the injured employee." See also Baker v. Texas & Pacific Railway Co., supra at 228-229; Ward v. Atlantic Coast Line R. Co., supra at 398-400; and Kelley v. Southern Pacific, supra at 324-327.[3] Nonetheless,

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[3] In none of the FELA cases cited by the Appellate Division in support of its decision (App., infra, p. 7a) [Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1, 6 (1963); Ancelet v. Nat'l Railroad Passenger Corp., 913 F.Supp. 968 (E.D.La. 1995); Melancon v. Amoco Production, 834 F.2d 1238 (5th Cir. 1988); Stiltner v. Norfolk & Western Railway Co., 1994 WL 901187, *2 (W.D.Va. 1994)] were railroad supervisory personnel present at the time of

(continued...

the Appellate Division totally ignored petitioner's uncontested evidence regarding FELA employment of petitioner by the railroad, i.e., the degree of control exercised by Metro-North employees over Mr. Smith's activities at the time of the accident, and inexplicably relied solely on Metro-North's evidence regarding Mr. Smith's generalized employment relationship with Asplundh. However, generalized employment factors, such as who pays the injured worker and the length of time the injured worker has been employed by the independent contractor, as this Court observed in Kelley, supra, at 327, n. 9, "[w]hile... generally relevant to the employment inquiry..." do not "bear significantly on [the railroad's] control over or right to control [the worker's] activities" at the time of injury.

The significant evidence of the nature of the work petitioner performed and of respondent's control of and right to control his work at the time of the accident was critical to resolution of the issue of whether petitioner was also "employed by" Metro-North for FELA purposes at the time of the accident. Indeed, two trial court judges in State Supreme Court denied Metro-North's successive motions

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[3](...continued)
the accidents involved. This, of course, is in clear contradistinction to the instant case in which Vines, the Metro-North track foreman, was present with and directing Smith at all times during the course of the work which resulted in the accident.

for summary judgment precisely because they recognized that the disputed facts going to the "employed by" question had to be submitted to the jury. The opposite conclusion by five Judges of the Appellate Division is not justified by the record, and is belied by its insubstantial opinion, which failed to refer to any of the facts favorable to Mr. Smith's claim, and did not even cite Baker, supra.

The fact that the Appellate Division (1) failed to refer to, let alone consider or analyze, the material facts relating to the supervisory role played by Metro-North employees at the time of the accident as required by Baker and Kelley; (2) analyzed only the generalized employment relationship between petitioner and his employer, Asplundh; (3) further failed even to cite, let alone attempt to differentiate, Baker; and (4) erroneously relied entirely upon factually inapplicable federal district court cases in which there were no railroad employees present at the site at the time of the accident, indicates that the Appellate Division arived at its wrong conclusion because it analyzed the wrong question. The Appellate Division totally ignored the critical issue of whether petitioner, by virtue of Metro-North's control over his activities at the time of the accident, was also the employee of Metro-North when he was injured. By restricting its analysis to the non-relevant issue of general employment, the Appellate Division came to the inescapable but irrelevant conclusion that Asplundh was, indeed, petitioner's general employer. But, as this Court has confirmed, such a

finding of general employment by Asplundh does not "bear significantly" on the issue of Metro-North's control over Smith's activities at the time of the accident. Kelley, supra, at 327 n.9. Because the Appellate Division ignored Baker, it failed to analyze the real issue in this case, to wit: in addition to being an employee of Asplundh at the time of the accident, was petitioner also under the supervision and control of Metro-North employees and, therefore, at the time of the accident, also "employed by" Metro-North for purposes of FELA? In failing to make the required analysis of the degree of control exercised by the railroad over petitioner at the time of the accident, the Appellate Division created a new and incorrect standard of review for FELA cases in New York. Since the Appellate Division has now incorrectly declared that one needs only to review generalized employment factors in making a determination as to whether or not an employee of an independent contractor is also "employed by" the railroad at the time of the accident, it is now irrelevant in New York how much control was actually exercised by the railroad over the injured worker at the time of the accident. Since, by definition, all employees of independent contractors are the generalized servant of the contractor and not the railroad, henceforth, in New York, no injured employees of independent contractors will be able to recover under FELA regardless of the degree of control actually exercised over their work by the railroad at the time of the accident.

This issue of dual employment for FELA purposes is one of first impression in the New York State courts. Because the New York State courts have now addressed it, the Appellate Division opinion, if left to stand, will totally eviscerate the rights of all employees of third-party contractors who are injured while performing dangerous work on New York railroad property under direct railroad supervision, to obtain the FELA protection accorded to them by Congress and this Court for nearly 100 years.

This determination by the Appellate Division, as it now stands, derides this Court's mandate to preserve for the jury the right to analyze the actual facts relating to supervision by the railroad over the activities of the injured employee at the time of the accident and is in direct derogation of the well established FELA rights of employees of independent contractors performing railroad work. Further, the Appellate Division's opinion not only completely overturns Baker and its progeny in New York, but also creates a dangerous precedent for other jurisdictions that may wish to deny workers of independent contractors injured on the railroads their federally protected FELA rights. If left to stand, the Appellate Division opinion will increasingly encourage railroads to farm out the most dangerous work on railroad property to "independent contractors" knowing that any worker employed by such "independent contractor" who is injured while performing these railroad activities will not share in the FELA protections guaranteed to all

other railroad employees by the unequivocal mandate of Congress and this Court.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted, the decision below should be summarily reversed, and the case should be remanded for trial.

Respectfully submitted,

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FEBRUARY 1997

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of November 1996

PRESENT, Hon. Judith S. Kaye,
Chief Judge, presiding.

1-13 Mo. No. 1297

Gregory Alan Smith,

Appellant,

v.

Metropolitan Transportation Authority,

Defendant,

Metro-North Commuter Railroad,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been sub-

mitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Ciparick took no part.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 1, 1996

Present -- Hon. Joseph P. Sullivan
Justice Presiding
Ernst H. Rosenberger
Eugene Nardelli
Milton L. Williams
Peter Tom,
Justices

Gregory Alan Smith,
Plaintiff-Respondent,

-against- M-3442

Metropolitan Transportation Authority, Index No. 166/90
Defendant,

-and-

Metro-North Commuter Railroad,
Defendant-Appellant.

[And a Third-Party and
Second Third-Party Action.]

Plaintiff-respondent having moved for leave to appeal to the Court of Appeals from this Court's decision and order entered on April 9, 1996 (Appeal No. 57320),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is denied.

ENTER:

/s/ David Apoleony
Deputy Clerk

Sullivan, J.P., Rosenberger, Nardelli,
Williams, Tom, JJ.

57320

Gregory Alan Smith,
Plaintiff-Respondent,
David Perry

-against-

Metropolitan Transportation Authority,
Defendant,

-and-

Metro-North Commuter Railroad,
Defendant-Appellant.
Cathleen A. Giannetta

[And a Third-Party and
Second Third-Party Action]

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered on or about October 19, 1995, which, inter alia, denied Metro-North's motion for summary judgment dismissing the complaint brought under the Federal Employer's Liability Act ("FELA"), unanimously reversed, on the law, without costs, defendant Metro-North's motion for summary judgment granted and the complaint

dismissed. The Clerk is directed to enter judgment in favor of defendant Metro-North, dismissing and severing the action as against it.

Defendants' second summary judgment motion, based upon new evidence gained by discovery during the five years subsequent to the first motion, was not precluded by the law of the case doctrine (Beagan v. Manhattanville Nursing Care, 176 AD2d 633, 635 lv denied 79 NY2d 753; Holloway v Cha Cha Laundry, 97 AD2d 385, 386; Chiarello v Sylvan, 161 AD2d 948, 949), and should have been granted, since no triable issues of fact exist.

In order to come within the ambit of FELA, plaintiff must demonstrate that he was a railroad employee at the time of his injury, i.e., that at such time, the railroad had significant supervisory control or the

right to such control over the performance of his duties (Lindsey v Louisville & Nashville Railroad Co., 775 F2d 1322, 1324; Kelley v Southern Pacific Co., 419 US 318, 327; Bailey v Missouri Kansas Texas Railroad, 732 SW2d 248, 250). A review of the factors to be considered in making this determination (see e.g., Shenker v Baltimore & Ohio R. Co., 374 US 1, 6; Melancon v Amoco Production, 834 F2d 1238, 1244; Ancelet v Natl. Railroad Passenger Corp., 1995 WL 683860 [E.D. La. 1995]; Stiltner v Norfolk & Western Railway Co., No. 92-781-R [W.D. Va. May 16, 1994]) clearly indicates that plaintiff was not an employee of defendant Metro-North at the time of the accident, and that Metro-North's role relative to the work performed by plaintiff was merely to coordinate plaintiff's herbicide spraying with the operation of the railroad

such that both were accomplished safely and efficiently.

Specifically, Asplundh, not Metro-North, was plaintiff's employer; Asplundh was an independent contractor retained to perform weed killing services; Asplundh supervised and directed its employees in the performance of the contract; Asplundh hired plaintiff and had the right to fire or discipline him; Asplundh furnished all the equipment and supplies used by plaintiff to perform his duties; plaintiff was trained by Asplundh; Asplundh paid plaintiff's wages; plaintiff's work on Metro-North property was seasonal and non-continuous and he only worked there briefly; Asplundh, not Metro-North, was in the business of weed and brush spraying; and plaintiff worked for a number of different railroads in the course of his employment with Asplundh.

A railroad's efforts to coordinate an independent contractor's work with its own ongoing operations have been found insufficient to bring a plaintiff within the ambit of FELA (Kelley, supra, at 329; Stiltner, supra; Ancelet, supra), and plaintiff's attempts to characterize such efforts as "control" here are to no avail. On the other hand, plaintiff significantly downplays the facts in the cases cited in support of his position, such as Buccieri v Illinois Central Railroad (235 Ill App3d 191 lv denied 148 Ill2d 640) and Vinyard v Missouri Pacific Railroad (632 SW2d 272), where the circumstances unquestionably indicate control on the part of the railroad and are readily distinguishable from this case.

Accordingly, we find, as a matter of law, that in all material respects, plaintiff's employer, Asplundh, not Metro-North,

exercised authority and control over his work at the time of his injury, and as a consequence, defendant's motion for summary judgment is granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 9, 1996

/s/ David Apoleony

DEPUTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

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GREGORY ALAN SMITH,

Plaintiff,

-against-

METROPOLITAN TRANSPORATION AUTHORITY, and METRO-NORTH COMMUTER RAILROAD,

Defendants.

----------x

etc.

----------x

Index No. 166/90

DECISION AND ORDER

MARTIN SCHOENFELD, J.:

In this action plaintiff Gregory Alan Smith alleges that the negligence of defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad ("Metro North") (collectively "MTA") caused the severe electric shock he received on August 7, 1988, when he came in contact with energized

overhead catenary wires while spraying herbicide from a "high-rail truck" on encroaching vegetation along MTA tracks near Milford, Connecticut. Defendants now move for summary judgment dismissing plaintiff's claim under the Federal Employer's Liability Act, 45 USC §§ 51-60 ("FELA"), on the ground that plaintiff was not an "employee" of a railroad (he indisputably was an employee of first third-party defendant Asplundh Tree Expert Company, or a division or subsidiary thereof, an independent contractor), and on the additional ground that, in any event, the Metropolitan Transportation Authority (as opposed to Metro-North) is not a railroad and had no direct connection with the accident at issue.

MTA concedes that it has already made a motion for the same relief, on the same ground, and in this same case, and that the motion was denied by Hon. Carmen Beauchamp

Ciparick in a decision dated March 12, 1991. In support of its making the motion again, MTA relies on the facts that the prior motion was pre-disclosure and that disclosure is now complete. Nevertheless, this repeat motion clearly runs afoul of the "law of the case" principle.

> The doctrine of the "law of the case" is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of coordinate jurisdiction are concerned.

Martin v City of Cohoes, 37 NY2d 162, 165 (1975) (Fuchsberg, J.) (citations omitted); accord, Holloway v Cha Cha Laundry, 97 AD2d 385, 386 (1st Dep't 1983). There is nothing in Justice Ciparick's order suggesting that her denial was "without prejudice." Cf. CPLR § 3212(f) (where facts in opposition to the motion may exist but cannot then be stated, the court may, *inter alia*, order a continu-

ance to permit disclosure to be had). Justice Ciparick discussed the facts, based on the parties' affidavits, and concluded that "a question of fact [exists] which will necessitate a trial." Slip op. at 4. Thus the instant motion, to the extent that it seeks a determination that as a matter of law plaintiff was not an "employee" of MTA as that term is used in FELA, must be denied on "law of the case" grounds alone.

Nevertheless, this Court has examined the question again, since "a question may be reconsidered if new evidence has come to light since the initial ruling." Holloway, *supra*, 97 AD2d at 386.

The controlling law was summarized by the Supreme Court in Kelley v Southern Pacific Co., 419 US 318 (1974):

> Under common-law principles, there are basically three methods by which a plaintiff can establish his "employment" with a rail carrier

> for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he cold be deemed to be acting for two masters simultaneously. Finally, he could be the subservant of a company that in turn was a servant of the railroad.

Id. at 324 (citations omitted). Even considering the parties' factual submissions *de novo*, this court concludes that an issue of fact has been raised as to whether plaintiff could be considered an "employee" of Metro-North pursuant to FELA. Plaintiff states that a Metro-North "Track Foreman" named Cornelius Vines "was generally in the passenger seat receiving instruction from the Metro-North tower operators, was directing where and when we entered the Metro-North tracks, where and when we sprayed, where and when we moved onto the through tracks or were sent to a siding." Indeed, plaintiff came in contact with the wires when trying to get off

the spray truck just after it was stopped upon orders of Metro-North. Furthermore, since energized overhead wires are a not atypical hazard of railroads, and since herbicide spraying is necessary to keep the tracks clear, plaintiff would appear naturally to fit within the Congressional intendment in passing the FELA. Other evidence submitted by the parties; federal railway regulations; and the contract at issue either support plaintiff's position here, or do not seriously undermine it.

The potential liability of the Metropolitan Transportation Authority is another matter altogether. Justice Ciparick simply stated, slip op. at 4, as follows:

> the court will not allow the MTA to deny liability as owner of Metro-North without sufficient proof that its operations and dealings with Metro-North are of a nature requiring insulation from liability....

However,

> [a] party opposing [a] motion [for summary judgment] must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose.

Gilbert Frank Corp v Federal Insurance Co., 70 NY2d 966, 967 (1988) (citations omitted). Here, plaintiff has not submitted any "evidentiary proof" that would place liability on the Metropolitan Transportation Authority. Furthermore, as this court has noted,

> "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance and control of any facility." (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2d Dept 1984]

Belle v New York City Transit Authority, 157 Misc 2d 76, 77 (Sup Ct, NY County, 1993). In sum, no facts have been elicited that in this particular instance would prevent application

of the general rule that the Metropolitan Transportation Authority is not liable for accidents involving transit operations.

Thus for the reasons set forth herein, Metro-North Commuter Railroad's request for summary judgment is denied and Metropolitan Transportation Authority's request for summary judgment is granted. The Clerk is directed to enter judgment dismissing Metropolitan Transportation Authority from the case as per this opinion.

This opinion constitutes the decision and order of the Court.

Dated: October 19, 1995

/s/ MS

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

GREGORY ALAN SMITH,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD,

Defendants.

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD,

Third-Party Plaintiffs,

-against-

ASPLUNDH TREE EXPERT CO. and ASPLUNDH RAILROAD, a Division of ASPLUNDH TREE EXPERT CO.,

Third-Party Defendants.

Index No. 166/90

C. BEAUCHAMP CIPARICK, J.:

Defendants and third-party plaintiffs Metropolitan Transportation Authority (MTA) and Metro-North Commuter Railroad (Metro-North) move for summary judgment dismissing

the complaint of plaintiff Gregory Alan Smith.

Mr. Smith commenced this negligence cause of action for damages as a result of injuries sustained on August 7, 1988 while he was performing brush spraying operations on defendants' railroad tracks. Plaintiff was assigned to a high rail spraying vehicle near Milford, Connecticut when he came in contact with a overhead high-voltage wire. Plaintiff's job assignment was the result of a contractual agreement between Metro-North and the Asplundh Railroad Division (Asplundh) dated May 18, 1987. Asplundh is a third-party defendant in this action.

Plaintiff pleads a cause of action under the Federal Employers Liability Act (FELA), 45 USC §§51-60, alleging that at the time of his injury he was employed by the defendants within the meaning of FELA.

Defendants assert that Mr. Smith was an employee of Asplundh who was contracted as an independent contractor to provide brush spraying services. They argue that Metro-North exercised no control over the activities of Asplundh or its employees and, therefore, plaintiff has no cause of action against defendants under the FELA. In support of their position they have submitted the affidavit of Mr. Stephen G. Cole, Engineer of Program Improvement, allegedly responsible for coordinating brush spraying activities with schedules and track time with divisions within Metro-North and the MTA.

Mr. Cole asserts that the Asplundh employees were hired, trained and paid by Asplundh; Mr. Smith and others received all their directions from Asplundh and could be fired only by Asplundh. The defendants assert that the only Metro-North employee at

the work sites was responsible for getting track time from dispatchers to permit the Asplundh crew to enter or exit specific blocks of track.

In opposition to defendants' motion, plaintiff has submitted his affidavit which alleges that on the day of the accident he and his associate were under the direct and complete control of Cornelius Vines, Track Foreman at Metro-North. In fact, plaintiff alleges that Mr. Vines was in the high rail truck directing the spraying activities and Mr. Vines was the only person at the work site directing and controlling the spraying activity.

> Under common law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury.... Second, he could be

> deemed to be acting for two masters simultaneously.... Finally, he could be a subservant of a company that was in turn a servant of the railroad.... (Kelly v. Southern Pacific Co., 419 U.S. 318, 324 [1974]; Smoot v. New York Susquehanna and Western Railway Corp., 707 F. Supp. 629, [N.D.N.Y. 1989]).

Plaintiff here does not allege he was a borrowed employee since he asserts no facts that suggest that his injury occurred while involved in activities outside his scope of employment with Asplundh (see, Taras v. Baker, 411 F. Supp. 426, [E.D.PA. 1975], aff'd 535 F. 2d 1245, 1248 [3d Cir. 1976]). The issue of whether plaintiff is acting for two masters or is a subservant of a company in turn a servant of the railroad is generally a question of fact (Baker v. Texas & Pacific Railway Co., 359 U.S. 227, 228 [1959]). The proper inquiry is whether defendants exercised sufficient control over plaintiff's activities to bring him within

the ambit of FELA (Lindsey v. Louisville & Nashville Railroad Co., 775 F. 2d 1322, 1324 [5th Cir. 1985]).

On this motion defendants have the burden of demonstrating that there is no triable issue of fact (Rotuba Extruders v. Ceppos, 46 N.Y. 2d 223; see also, Selser v. Pacific Motor Trucking Co., 770 F. 2d 551, 553 [5th Cir. 1985]). They have not met that burden. The opposing affidavits submitted to this court clearly indicate the presence of a question of fact which will necessitate a trial. The court's decision is not changed by its review of the submitted contract between Metro-North and Asplundh since the contract specifically states that the "contractor's [Asplundh] supervision, direction and control [is] subject to general oversight and guidance." These terms are ambiguous and therefore not controlling as to the "locus of

the power to control and direct the plaintiff's work" (Kelly v. Southern Pacific Co., supra, at 329-331; see also, Hartford Accident & Indemnity Co. v. Weslowski, 33 N.Y. 2d 169).

Finally, the court will not allow the MTA to deny liability as owner of Metro-North without sufficient proof that its operations and dealings with Metro-North are of a nature requiring insulation from liability (Bethlehem Steel v. Solow, 51 N.Y. 2d 870).

Accordingly, defendants' motion for summary judgment is denied in its entirety.

Defendants are ordered to comply with this court's order dated November 21, 1990 within twenty-five (25) days of service of this order upon defendants with notice of entry.

This is the decision and order of the court.

/s/ CBC

J.S.C.

Dated: March 12, 1991